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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-909

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Petitioners

v.

PATSY T. MINK, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. In a suit to compel disclosure of information under the Freedom of Information Act, 5 U.S.C. § 552, where the government has already turned over most of the disputed materials to the district court for *in camera* inspection in a related litigation, should this

Court review the ruling of the court of appeals directing the district court to inspect those materials in this case?

2. In any event, where government agencies fail to meet their statutory burden of proving the materials exempt from disclosure, did the court of appeals correctly remand the case to the district court for an *in camera* inspection to determine the validity of the agencies' claims?

STATEMENT

The respondents are 33 duly elected and installed Members of the United States Congress. They commenced this suit under the Freedom of Information Act, 5 U.S.C. § 552,[1] to compel the petitioners[2] to disclose certain documents pertaining to an underground nuclear test, code-named "Cannikin," conducted at Amchitka Island, Alaska on November 6, 1971.

Before the district court, the petitioners admitted the existence of the documents sought. Those documents—numbering nine in all[3]—are reports, memo-

[1] The statute provides pertinently:

> "On complaint, the district court of the United States in the district . . . in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." § 552(a)(3).

[2] The petitioners are the Environmental Protection Agency and its administrator Ruckelshaus; the Council on Environmental Quality and its chairman Train; the Office of Science and Technology and its director David; and the Department of State, its secretary Rogers, and its undersecretary Irwin.

[3] A tenth document—the "impact statement" of the Atomic Energy Commission—has been publicly available at all pertinent times.

randa, or letters prepared in connection with a study of the Cannikin test by a committee under the chairmanship of the Undersecretary of State, John N. Irwin, II. Under the Act, the petitioners had the burden of proving their right to withhold the documents.[4] However, the petitioners resisted disclosure, claiming exemptions under the Act itself—(1) that the documents are "specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy," § 552(b)(1), and (2) that they are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency [from which disclosure is sought]," § 552(b)(5).

The petitioners moved for summary judgment, relying solely upon an affidavit submitted by the petitioner Irwin. That affidavit asserted that all except one of the nine documents "involve highly sensitive matter that is vital to our national defense and foreign policy," and that all of the disputed documents "were prepared solely for the purpose of giving advice to the President. . . ."

The Irwin affidavit did not purport to claim that each of the documents in question had been *specifically* kept secret by Executive order, as required by the statute. To the contrary, the affidavit suggested that the documents had been classified pursuant to Executive Order 10501—an order, promulgated in 1953, that establishes the general classification scheme for all executive agencies. Moreover, the affidavit suggested that at least some of the documents in question had

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[4] The Act provides pertinently: "The court shall determine the matter de novo and the burden is on the agency to sustain its action." § 552(a)(3).

been classified secret not because of their own contents, but because they were physically attached to other documents that had been so classified. That suggestion was strengthened by the subsequent admission of the petitioner Ruckelshaus, whose memorandum is one of the documents at issue here, that "nothing in [his] comment . . . needs to be stamped 'top secret.'"

Nor did the Irwin affidavit purport to claim that each—or any—of the documents in dispute consisted solely of recommendations for the President, rather than recommendations together with factual information.

The petitioners offered in evidence nothing besides the Irwin affidavit. Despite the deficiencies in their proof, the district court granted their motion for summary judgment on each of the two statutory grounds they had advanced. The court did so without examining the documents in question. It also dismissed the complaint on "separation of powers" grounds insofar as the respondents sought to maintain the action in their official capacities as Members of Congress; and it dismissed as moot the respondents' motion for summary judgment, based on the statutory claim that the exemptions in the Act have no application to them.[5]

On the respondents' expedited appeal, the court of appeals reversed and remanded the matter to the district court for further consideration. The court of appeals did not pass upon all the questions argued to it (Pet. 29). Rather, the court "conclude[d] that summary disposition . . . is inappropriate," and that

[5] Section 552(c) provides pertinently: "This section [552, including the exemptions in subsection (b)], is not authority to withhold information from Congress."

the issues argued by the parties "should be the subject of a full consideration on the merits by this court if the appeal is continued following the disposition on remand" (Pet. 24). Thus, it did not reach the question whether the respondents had standing to sue in their official capacity as Members of Congress, nor whether the Freedom of Information Act confers any greater rights to disclosure on Congressmen than it does on members of the public generally.[6] The court did not pass on the respondents' contention that the first exemption requires each document sought to be withheld to be classified by a separate Executive Order (Pet. 24).

The court of appeals decided two narrow issues. The first related to the petitioners' claim under the first exemption. Here the court noted the inadequacies of the Irwin affidavit. It thought that a matter as important as that involving the first exemption should not be determined on the basis of the Irwin affidavit as it stood. It directed the District Court to "take evidence on whether, and to what extent, the file [of withheld documents] contains documents that are now within the umbrella of a secret file but which would not have been independently classified as secret." On the same reasoning, it directed the trial court to determine whether "non-secret components [of documents] are separable from the secret remainder and may be read separately without distortion of meaning" (Pet. 27).

The second holding of the court of appeals directed similar treatment with respect to the petitioners'

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[6] Contrary to the petitioners' suggestion (Pet. 8, n. 2), these issues *are* germane on this petition, since their resolution in the respondents' favor by this Court would preclude a reversal of the judgment below.

claim under the fifth exemption. Here the court noted that "the exemption protects the decisional processes of the President, or other policy-making executive officials" (Pet. 28). The court ruled that it would extend that protection to factual information wherever "it is inextricably intertwined with policy-making processes" (*ibid.*) (footnote omitted).

The court of appeals demonstrated its awareness of the sensitivity of the materials at issue. "In approaching this problem," it said, "we have in mind the very special place the President occupies in the conduct of foreign affairs, both traditionally and constitutionally, apart from his additional responsibilities in connection with the national defense." Commenting on the first exemption, the court noted:

> "In the exemption from disclosure contained in Section 552(b)(1) Congress has recognized the need for protection of the channels of communication and advice to the President in both these respects which are involved in the present litigation . . . . Moreover, although we have held in *Soucie* v. *David* [448 F.2d 1067] . . . that the policy of the Act requires that the exemptions from disclosure prescribed by [the statute] . . . be construed narrowly, this admonition must be tempered somewhat when the documents contain data supplied to the President with respect to nuclear explosions involving not only the national defense but the conduct of foreign affairs by the President in the context of such nuclear testing" (Pet. 28-29).

With respect to the fifth exemption, the Court observed that the district court

> "will likewise have in mind, in possibly separating out factual data that can be disclosed without

impinging on the policymaking decisional processes intended to be protected by this exemption, the sometimes delicate character of the responsibility of the President in the conduct of foreign affairs" (Pet. 29).

To avoid unwarranted disclosure of the disputed materials, the court of appeals ordered an *in camera* inspection of the documents by the trial court, "else the possibility of *nondisclosure* under the guides . . . would be defeated" (Pet. 28) (emphasis supplied). Thus—contrary to the petitioners' suggestion—*in camera* inspection was ordered to protect the government from excessive disclosure. The court viewed the *in camera* process as a judicial restriction upon public access to documents held by the government—a restriction adopted to implement the disclosure requirements of the Act without revealing any materials that the government might be entitled to withhold.

ARGUMENT

I. THE CASE DOES NOT RAISE THE QUESTIONS SOUGHT TO BE PRESENTED

The petitioners urge that "[t]his case presents important and recurring questions concerning the proper role of the courts in suits brought under the Freedom of Information Act" (Pet. 9) (footnote omitted). The respondents respectfully disagree.

1. Most of the documents in dispute have already been reviewed *in camera* by the trial judge, the court of appeals, and this Court.

According to the petitioners, "At issue here is whether the courts may undertake *in camera* inspection of documents which need not be disclosed by virtue of [the first and fifth] . . . exemptions" (Pet. 10).

But that issue is no longer a live one with respect to the documents in dispute here. For the same district judge who refused to look at the nine disputed documents in this case on August 27, 1971, subsequently looked at all but three of them two months later. In *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, — F.2d — (C.A.D.C. Oct. 28, 1971) (No. 71-1854), the district court ordered the government to submit six of the nine documents here at issue for his personal *in camera* inspection.[7] Upon the government's interlocutory appeal, the court of appeals rejected the contention that an invocation of "executive privilege" precluded an *in camera* screening of the documents by the district court. — F.2d, at —, slip op., at 3.

The court of appeals provided for a review and stay of its order by this Court, if the government should request it. No applications to that effect were ever made, and the time to seek certiorari has since expired.[8] The district court performed the *in camera* inspection that the government now says will "create serious problems" (Pet. 10), and released to the public portions of the documents at issue here. The documents were before the court of appeals, and before this

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[7] Of the various documents referred to by Mr. Irwin in Paragraph 5 of his affidavit (Pet. 6-8), the only three not fully reviewed *in camera* in *Nuclear Responsibility* appear to have been Items A, B and B2.

[8] That this decision not to seek review was a deliberate one is established by the statements of the Solicitor General before this Court on the oral argument of *Nuclear Responsibility*, 404 U.S. 917, *denying injunction* in — F.2d — (C.A.D.C. Nov. 3, 1971) (Nos. 71-1869 & Misc. 3717). See Transcript at 50-51.

Court, on the hearing of the *Nuclear Responsibility* plaintiffs' motion for an injunction.[9]

Even if the government's failure to seek review of the order of the court of appeals in *Nuclear Responsibility* does not bind it now, and even if the district court's *in camera* inspection of documents does not entirely moot the government's present position—points the respondents do not concede—still the question presented for review is so stale as not to merit this Court's consideration.

2. The case is not ripe for review.

The petitioners contend that the holding below, if sustained, "would create serious problems for the executive branch of the government" (Pet. 10). Those "problems" are difficult to see, in light of the considerable public disclosure that has already taken place as a result of the *Nuclear Responsibility* litigation. Moreover, it must be remembered that the court below has directed no additional disclosure, but only an *in camera* review by the trial court. If that court should order further public dissemination on the remand, the petitioners will have ample opportunity to seek review in the court of appeals and this Court.

In any event, the Court should not be asked to speculate on what the petitioners' "problems" are, or how serious they would be, until the courts below have had opportunity to deal with them. An *in camera* inspection by the district court may result in the conclusion that no materials besides those already disclosed in *Nuclear Responsibility* may be made public. The dis-

[9] See Transcript, *supra* n. 8, at 15-16, 26.

trict court may arrive at that conclusion, either on the basis of an examination of the documents themselves, or on the basis of his examination assisted *ex parte* by a government representative.[10]

On the other hand, the court may determine that whole sections of documents before it consist of materials to which the public is entitled, and that clearly labelled and defined documents or sections of documents may be revealed. That is just what happened to several of the documents here following the *in camera* inspection in *Nuclear Responsibility.*

3. A remand to the trial court is necessary in any event.

The Court of Appeals held that documents attached to a classified file, but not independently classified, do not come within the exemption for secret material. The petitioners acquiesce in that holding (Pet. 9, n. 4). Since the district court failed to make any findings on the issue, a remand to that court is necessary to carry out the court of appeals ruling.[11]

Moreover, although the court of appeals did not pass upon the question, the district court erred in dismissing

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[10] The latter course was suggested by the court of appeals in *Nuclear Responsibility,* and evidently was followed by the district judge on the remand that resulted in the release of the documents. See *Nuclear Responsibility, supra,* slip op. at 11, n. 12. The respondents do not concede the propriety of this procedure.

[11] Conceivably a remand might be avoided if the petitioners prevail upon their argument that the fifth exemption precludes disclosure of any of the documents. But, as is shown *infra* at 16-19, the petitioners cannot prevail on that score—if for no other reason than that the same district judge, in reviewing most of the documents at issue here, has already determined that the policies reflected in the fifth exemption do not bar public disclosure of portions of the disputed documents, and has made those portions public.

the respondents' complaint insofar as they sought to maintain the action in their official capacities as Members of Congress. The trial court acted on the theory that the doctrine of "separation of powers" precludes Members of Congress from resorting to the federal courts in controversies with the executive branch of the government. Because this ruling was clearly incorrect,[12] the court of appeals' reversal of the district court's judgment and remand of the matter for further proceedings must be affirmed even if the petitioners prevail upon the arguments they now advance. If certiorari is granted, the respondents will brief and argue the "separation of powers" issue in support of the judgment below.[13]

II. THE DECISION OF THE COURT OF APPEALS IS CORRECT

The decision below correctly follows the language, the legislative history, and prior judicial interpretations of the Freedom of Information Act. The court below has properly remanded the matter to the trial court for further proceedings.

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[12] *Cf., e.g., Powell* v. *McCormack,* 395 U.S. 486; *Baker* v. *Carr,* 369 U.S. 186, 217; see *Udall* v. *FPC,* 387 U.S. 428; *Secretary of Agriculture* v. *United States,* 347 U.S. 645; *United States ex rel. Chapman* v. *FPC,* 345 U.S. 153; *Moss* v. *C.A.B.,* 430 F.2d 891 (C.A.D.C.)

[13] In the event certiorari is granted, the respondents will also brief and argue the statutory question whether the Freedom of Information Act renders inapplicable to these respondents the exemptive provisions relied upon by the petitioners. Subsection c provides pertinently: "This Section [552] is not authority to withhold information from Congress." Since subsection b is part of the section, the quoted language removes the exemptions in any Freedom of Information Act suit brought by Members of Congress. For respondents' right to present these issues, see R. Stern & E. Gressman, Supreme Court Practice 314-15 (4th ed. 1969), and cases there cited.

1. The Freedom of Information Act requires disclosure.

The petitioners acknowledge that the Freedom of Information Act "generally makes government records available for public inspection" (Pet. 9). The statute was enacted in 1966 to replace the prior law, under which agency and department heads enjoyed a "sort of personal ownership of news about their units. . . ." H.R. Rep. No. 1497, 89th Cong. 2d Sess. 2 (1966). As Judge Friendly has said, the Congressional purpose in passing the Act was to "increase significantly the public availability of agency records." *LaMorte* v. *Mansfield,* 438 F.2d 448, 451 (C.A. 2).

The Act accomplishes its purpose by providing that in any action commenced against an agency to compel the disclosure of records, the district court "shall determine the matter de novo and the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(3). The Act thus "rejects the usual principle of deference to administrative determinations by requiring a trial 'de novo' in the district court," *Soucie* v. *David,* 448 F.2d 1067, 1077 (C.A.D.C.), and by "shift[ing] the burden of proof to the defendant." *Consumers Union* v. *Veterans Administration,* 301 F. Supp. 796, 806 (S.D.N.Y.), *appeal dismissed as moot,* 436 F.2d 1363 (C.A. 2).

The procedure of de novo judicial review, with the burden of proof on the agency, applies as well to any claim by the agency that the documents sought to be disclosed come within one of the statutory exemptions in the Act. *Epstein* v. *Resor,* 421 F.2d 930, 933 (C.A. 9), *cert. denied,* 398 U.S. 965. The Act permits the withholding of information only as "specifically stated" in the exemptions. Section 552(c). In keep-

ing with the express language of the Act and its legislative intent, the exemptions are to be narrowly construed. *Wellford* v. *Hardin,* 444 F.2d 21, 25 (C.A. 4).

2. The first exemption does not immunize entire documents simply because they are labelled "secret."

The petitioners urge that the documents here in dispute come within the first exemption, for matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," 5 U.S.C. § 552(b)(1). They argue that the documents have all been labelled secret under the general classification scheme promulgated in Executive Order 10501 some 19 years ago.

The Freedom of Information Act makes no reference to Executive Order 10501. Neither does the Senate Report that accompanied the bill. The only pertinent document mentioning Executive Order 10501—and the sole legislative evidence offered by the petitioners—is the accompanying House Report. That report did not adopt the suggestion imputed to it by the petitioners—that classification under Executive Order 10501 would, without more, entitle the agency to withhold records under the new law. Rather, the Committee said:

> "[C]itizens both in and out of Government can agree to restrictions on categories of information which *the President has determined must be kept secret* to protect the national defense or to advance foreign policy, *such as* matters classified pursuant to Executive Order 10501". H. Rep. No. 1497, *supra,* at 9-10 (footnote omitted) (emphasis supplied).

The House Report's reference to Executive Order 10501 merely suggests the sorts of material that *the President,* under the new law, may properly determine to keep secret. The petitioners do not contend that the President has ever determined that any of the information sought by the respondents, or even the category of that information taken as a whole, "must be kept secret. . . ." Rather, the petitioners rely upon the fact that some officer of government, not known to the respondents and perhaps not known even to the President, has made this determination.

The petitioners also rely upon the decision of the Ninth Circuit in *Epstein* v. *Resor, supra.* But far from supporting the petitioners, *Resor* confirms the interpretation of the Act advanced by the court below. In *Epstein,* the Army had directed a complete re-examination of a file sought by the plaintiff. That examination was in progress, and was proceeding on a paper-by-paper basis; and it followed upon a recent previous review in which the file had already once been scrutinized in its entirety. 421 F.2d at 932. The court of appeals noted:

> "The executive determination of top secret classification does not rest on an ancient order unrelated to the conditions of today. The classification has been updated and the process of current review is continuing. Nor is the agency hiding material under a filing system that gives top-secret classification to material simply because it relates, for filing purposes, to other material that is truly top secret. A paper-by-paper review was in operation in May, 1968. Nor do we find a foot-dragging passing of responsibility for ordering declassification to other departments or nations." *Id.* at 933.

Here such detailed paper-by-paper examination is not in progress, and no such review has been conducted in the past.

Indeed, the *Resor* case stands for just the proposition that the petitioners contend no court other than the one below has advanced—that the federal judiciary may determine in a Freedom of Information Act suit whether various portions of classified documents should be released (Pet. 15). The district court in *Resor* said:

> "[I]t is equally without merit to say that Congress intended absolutely no effect by the Act on information that falls within the areas covered by the exemptions. The district courts at least have jurisdiction to determine whether the exemption applies in a given situation. In furtherance of this jurisdiction, it is reasonable to say that Congress intended the courts to determine whether classification within the first exemption is clearly arbitrary and unsupportable. Otherwise, the agencies could easily frustrate the purpose of full disclosure intended by Congress merely by labeling the information to fall within the exemption." 296 F. Supp. at 217.

The court of appeals expressly affirmed this holding, stating: "The District Court ruled that under (b)(1) it had authority to determine whether classification was arbitrary or capricious." 421 F.2d at 933.

The petitioners' interpretation of the first exemption is especially startling in light of their acceptance of the holding of the court below that documents attached to a classified file but not independently classified do not come within the first exemption (Pet. 9, n. 4). The rule of "derivative classification," which the petitioners now recognize to be inconsistent with the Congressional policy of disclosure mandated by the Act, is as

much a part of Executive Order 10501 as the rule imposing a single classification on a given document (see Pet. 4). There is no textual basis, in either the statute or the executive order, for the distinction the petitioners attempt to draw.

Nor is there a basis in policy for that distinction. A single document may be as easily severable into secret and non-secret components as two documents stapled to one another. The trial judge made just that determination when he ordered the release in *Nuclear Responsibility* of significant portions of several documents bearing an over-all secret classification.

3. The fifth exemption does not immunize entire documents simply because they are called "advisory."

The petitioners also contend that the documents at issue are entirely exempt by virtue of the fifth exemption, which immunizes "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," 5 U.S.C. § 552(b)(5). The petitioners argue that the literal language of the statute nowhere distinguishes between factual information and recommendations or opinions—the distinction drawn by the court below. Further, the petitioners say, the legislative history establishes that Congress rejected an attempt to draw such a line.

The petitioners err. The language of the exemption directly incorporates the fact-opinion distinction. It does so by limiting the statutory immunity to materials "not available by law to a party other than an agency in litigation with the agency" resisting disclosure. The House Report interpreted this language to mean that "internal memorandums which would routinely be dis-

closed to a private party through the discovery process in litigation with the agency would be available to the general public." H. Rep. No. 1497, *supra*, at 10. Every court that has so far construed the provision agrees that the issue posed by the pertinent language is whether a private party would be entitled to the disputed materials in the course of pretrial discovery in a federal proceeding. *Sterling Drug, Inc.* v. *FTC*, 450 F.2d 698, 705 (C.A.D.C.); *General Services Administration* v. *Benson*, 415 F.2d 878, 880 (C.A. 9); *Consumers Union, supra*, 301 F. Supp., at 804. "The fulcrum of this test is discovery practices as regulated by the courts." *Consumers Union, supra.*

Discovery practice under the Federal Rules of Civil Procedure has generated many decisions separating agency fact from opinion. Those decisions, now codified by the fifth exemption, uniformly recognize the "obvious distinction, in terms of necessity of inspection, between documents ['composed wholly of opinions, recommendations and deliberations'] . . . and those which contain facts." *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 327 (D.D.C.), *aff'd on opinion below*, 384 F.2d 979 (C.A.D.C.), *cert. denied*, 389 U.S. 952.[14]

The legislative history establishes that the fact-opinion distinction comports with the congressional intent. The accompanying House and Senate reports show that Congress contemplated an exemption carefully tailored to protect agency opinions and recommendations—in

[14] *Accord: Machin* v. *Zuckert*, 316 F.2d 336 (C.A.D.C.), *cert. denied*, 375 U.S. 896; *Boeing Airplane Co.* v. *Coggeshall*, 280 F.2d 654, 662 (C.A.D.C.); *Reliable Transf. Co.* v. *United States*, 53 F.R.D. 24, 25 (E.D.N.Y.); see also 4 J. Moore's Federal Practice ¶26.61[7], at 26-331 (2d ed. 1971).

the words of the House report, "advice from staff assistants and the exchange of ideas among agency personnel," H. R. Rep. No. 1497, *supra,* and in the words of the Senate report, "frank discussion of legal or policy matters in writing," S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).[15]

The petitioners argue that "the distinction . . . between factual matters and matters related to the 'policy-making process,' is highly unrealistic, for the selection and presentation of factual background bearing on a particular decision is virtually certain to be 'inextricably bound' with the decision-making process" (Pet. 17). That contention ignores the holding of the court below—that facts are exempt from disclosure wherever they are "inextricably intertwined" with the policy-making process. The contention also ignores the realities of this case—that the district judge who has al-

[15] The petitioners contend that the final language of the fifth exemption reflects a Congressional rejection of the fact-opinion distinction. But the legislative history demonstrates the contrary—it supports the distinction between documents that are "part of the deliberate process of the agency" and those that are "factual in substance." *Consumers Union, supra,* 301 F. Supp., at 805. The language "which would not be available by law to a party other than an agency in litigation with the agency" was substituted on the recommendation of the Senate Judiciary Committee for the earlier phrase, "dealing solely with matters of law or policy." S.Rep. No. 813, *supra,* at 1-2. In explaining the old language, the Committee had said in the earlier report: "All *factual* material in Government records is to be made available to the public . . . ." S.Rep. No. 1219, 88th Cong., 2d Sess. 7 (1964). "The substituted language, being more precise, seems to be a refinement of the policy versus fact distinction so that the distinction can still be used within the discovery test now explicitly laid down by the statute. It is at least clear, in light of the strong Congressional drive to promote disclosure, that the amendment was not intended to place 'factual material' within the coverage of the fifth exemption." *Consumers Union, supra.*

ready examined the documents has made just the distinction between fact and opinion that the petitioners say cannot be done.[16]

4. *In camera* inspection is an established and proper means for judicial administration of the Act.

The petitioners assert that the materials in dispute are entirely exempt under the statute, both because they have been classified "pursuant to Executive Order 10501" (Pet. 11) and because they are "entirely advisory in nature" (*id.* 18 n. 11). No court has ever made either determination on the basis of an examination of the documents. To the contrary, to the extent that the courts have looked at the documents—and the judges of three courts, including this one, have presumably done so—they have made the opposite determination. District Judge Hart, in an action left undisturbed both by the court below and by this Court, directed the release of significant portions of the documents. Presumably he would not have done so if he had believed that those portions disclosed either secrets classified "pursuant" to an executive order, or agency opinion entitled to be held in confidence. Presumably, he concluded that those portions consisted of facts—information the public is entitled to have.

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[16] In an affidavit filed in the *Nuclear Responsibility* case, the petitioner Train asserted, with respect both to the memorandum of the Council on Environmental Quality that is Item 5B5 in the Irwin affidavit (Pet. 7), and to other papers:

> "I have determined that it would be injurious to the proper performance of the Council's statutory responsibilities to the President to disclose the documents or their contents. . . ."

The portions of that memorandum, released by the District Court and reprinted as an appendix to this brief in opposition, reveal the solely factual nature of the material disclosed.

The government has not objected to *in camera* inspections of "secret" materials by trial and appellate courts and by this Court—in cases where *it* has applied for judicial review. See, *e.g., New York Times Co.* v. *United States,* 403 U.S. 713, *aff'g United States* v. *Washington Post Co.,* 446 F.2d 1327, 1328 (C.A.D.C.) and *rev'g United States* v. *New York Times Co.,* 444 F.2d 544 (C.A. 2), *rev'g* 328 F. Supp. 324, 326 (S.D. N.Y.). On the contrary, the Solicitor General urged this Court not long ago to resolve conflicts between the litigant's right to information and the government's need for secrecy by subjecting disputed materials to *in camera* inspection:

> "It is also familiar doctrine that when there is some recognized interest militating against unnecessary public disclosure of information which a litigant is seeking to discover, it is appropriate to submit the material to the district judge for *in camera* examination so that he may determine whether disclosure should be ordered." [17]

This Court has repeatedly provided for *in camera* inspection of documents over which the government and private litigants have conflicting claims. *See Taglianetti* v. *United States,* 394 U.S. 316 (electronic surveillance); *Dennis* v. *United States,* 384 U.S. 855, 874-75 (grand jury testimony); *Campbell* v. *United States,* 365 U.S. 85, 95 (Jencks Act statements); *Palermo* v. *United States,* 360 U.S. 343, 354 (Jencks Act statements); see also *United States* v. *Reynolds,* 345 U.S. 1, 10.

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[17] *Kolod* v. *United States,* 390 U.S. 136, Memorandum of the United States on Motion to Amend Order of Jan. 28, 1968, at 8, *modified sub nom. Alderman* v. *United States,* 394 U.S. 165.

The petitioners' assertion that the documents all fall within each of the two exemptions amounts to a thinly-disguised rejection of any role for the federal judiciary in the administration of the Freedom of Information Act, and a virtual emasculation of the Act itself. Their position amounts to the contention that de novo judicial review, with the burden of proof on the agency—as mandated by the Act—has no meaning; that judicial inquiry is to be foreclosed by the *ex parte* assertion of executive officers that their records are immune to disclosure.

CONCLUSION

For the foregoing reasons, the respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: February 14, 1972
Washington, D. C.

APPENDIX

December 2, 1970

MEMORANDUM FOR THE HONORABLE JOHN N. IRWIN II

SUBJECT: Potential Environmental Hazards Associated with CANNIKIN

[Deletion]

Earthquake Generation. The mechanism of an earthquake is still a matter of some speculation. In brief, the earth's crust is thought to be made up of numbers of rigid blocks generally of continental dimensions bounded by regions in which seismic activity is high. The blocks move relative to each other, but the cause of the motion is unknown. The scraping of one block against another leads to a concentration of energy in the form of elastic strain energy. The regions between blocks are characterized by fault or tears in the crust. An earthquake occurs when the strains in the crust build up to such an extent that the frictional forces along the faults are overcome. A large amount of strain energy is released and this produces the damage, though probably only a small fraction of the stored energy is tapped even in the great earthquakes.

Recent studies of both the Chilean earthquake of 1960 and the Alaskan earthquake of 1964 suggest that great earthquakes consist of a superposition of smaller quakes. The smaller quakes trigger each other like a line of falling dominoes, the combined effect being that of a great earthquake. The individual earthquakes making up a large earthquake have a magnitude of six to seven on a logarithmic scale. In the great earthquakes, having a magnitude intensity of eight, motion along the fault extends as far as a thousand kilometers. The energy released in the largest earthquakes is equivalent to several hundred megatons while the energy released in the postulated smaller component earthquakes is on the order of one to ten megatons.

Because of the vast energies involved in earthquakes, it had been thought until recently that man could not artificially produce an earthquake. Now there are three well-documented ways in which man is known to have triggered earthquakes.

A series of earthquakes were observed near Denver in a region that had previously been aseismic. The best interpretation of this phenomena is that waste fluids from the Rocky Mountain arsenal were pumped deep into the earth and lubricated a previously existing fault. Slippage along the fault was thus possible and strain that had previously accumulated in the adjacent rock over geologic time was liberated in the form of earthquakes.

A second example is found in the case of earthquakes associated with large lakes or reservoirs. As a result of loading of the earth's crust by these large bodies of water or by the modification of the groundwater flow or for some other reason not yet understood, substantial earthquakes have been associated with construction of large artificial lakes. A recent earthquake near Koyna Dam in India located in an area that is not normally seismic killed about 200 people. Similarly, many small earthquakes occurred when Lake Mead was filled.

A third example and one most relevant to CANNIKIN is the triggering of earthquakes by motion along known faults in Nevada by large underground nuclear explosions. Fault scarps over six feet in maximum height and several miles in length have resulted from fault movements initiated by underground explosions. The evidence is strong that natural strain energy stored in the earth has been released in the Nevada test site by the underground explosions.

An underground explosion can affect the strain field within the crust in a number of ways. The large amplitude surface waves generated by the underground explosion can

dynamically overload near surface breaks or fractures within the crust and bring about a strain adjustment. The creation of a large cavity together with a later collapse of the chimney produces permanent changes in the strain field. Observations in Nevada of the BENHAM event of about a megaton produced strain changes of sufficient magnitude to trigger an earthquake along previously existing faults of a distance about 15 kilometers. However, the strain field resulting from an underground explosion cannot be calculated with any precision because of the dependence of the field on the detailed geology which is largely unknown at any given location.

In addition to the direct effects of the blast on the strain field, the explosion will alter the pressure regime in the groundwater. The water pressure in the rocks interstices will increase due to the compaction of the ground around the cavity. This over-pressure might be as large as 10 bars at a radius of 18 km. This increase in the fluid pressure will reduce the friction between fracture separated blocks. The effect would be greatest on faults oriented parallel to the residual compressive stresses resulting from the test explosion. Thus, it is possible that the mechanism involved in the Denver earthquake would raise the probability of triggering a large earthquake.

All the earthquakes triggered by underground explosions in the various Nevada tests released substantially less energy than the explosion itself. If one could establish that this is a necessary condition then there would be no apprehension with regard to the CANNIKIN event. Unfortunately, this is not the case. The magnitude of the triggered earthquakes will depend on the state of strain in the crust in the general region at which the underground explosion is set off. Extrapolation from the Nevada experience is uncertain because of the fundamentally different geologic setting between Nevada and the Aleutians. Further, experience with MILROW does not provide a

sure basis for extrapolation. In the highly nonlinear phenomena involved in earthquake generation, there may be a threshhold value of the strain that must be exceeded prior to initiation of a large earthquake. The suggested explanation of the Chilean and Alaskan earthquakes in terms of a succession of smaller earthquakes would support this interpretation. In this model a number of lock points stabilize a fault. Once one lock point is broken, sufficient energy may be released to break other lock points. If the stored strain energy is large, then the triggered earthquake could be of much greater magnitude than the triggering event. The underground explosion could serve as the first domino of the row of dominoes leading to a major earthquake. The major fault in the general region of Amchitka is thought to be some 40km. beneath the test shot. The strain field will certainly be altered at this depth by the underground explosion. Observations on the BENHAM event showed strains exceeding tidal strains at 29km.

Potential Effects of a Triggered Earthquake. The population density in the Aleutian area is very low so even a major earthquake would cause little damage and little loss of life as a result of the direct impact of the earthquake itself. This would not be true if the generated earthquake were so large as to extend towards mainland Alaska. While this is improbable since the largest known earthquakes have extended along the faults on the order of a thousand kilometers but not two thousand kilometers, there are uncertainties with regard to fault lengths associated with earthquakes.

The real danger from the triggering of a large earthquake by the nuclear explosion is in a tidal wave or tsunami. Tsunamis generated in the Eastern Aleutians by earthquakes have had damaging effects at great distance. For example, a tsunami in 1946 killed 159 people in Hawaii and was observed in Peru. The potential long-range effect emphasized by the fact that this Chilean earthquake of 1960

caused loss of life in Japan. The mechanism by which a tsunami is generated is still uncertain; tsunamis are probably due to movements of the sea floor associated with fault motion. Large earthquakes in the near vicinity of Amchitka have not caused destructive tsunamis in the past. However, as in the case of earthquakes it is not possible at this time to assess quantitatively the probability of a tsunami following the explosion.

Effects of Explosion on Groundwater Movement. The explosion resulting in a cavity followed by a collapse of the overlying rock forming a rubble chimney will affect the groundwater flow in several ways. The initial shock wave and accompanying water overpressure may open up new fractures which could alter rates of flow.

The formation of the chimney will probably lead to a saucer-like depression even though the true rubble chimney does not extend to the surface. Since the groundwater level almost reaches the surface the depression will fill with water.

The chimney itself will be relatively permeable to water movement and there will be a tendency for the warm water near the cavity to move upward through the rubble. In this way radioactive nuclides, principally tritium, can be mixed throughout the chimney. The time scale for such mixing is not known but could be as short as a few years or less.

Water in the chimney would move to the sea at a rate dependent on the hydraulic head, the permeability of existing aquifers and permeability of any new fractures opened up by the explosion. USGS calculations indicate a time for such movement might be as short as one to two years. These are short times and are inconsistent with estimates made by AEC that tritium will be discharged into the ocean only 145 years after the explosion. At that time the concentration of tritium in the groundwater is expected to be at a level close to the maximum permissible concentration

for water. If the shorter times (5 to 10 years) postulated above are correct then the level of radioactivity in the groundwater entering the ocean would be in excess of ten thousand to one hundred thousand maximum permissible concentration for water.

Effects of Groundwater Release of Radioactivity into the Ocean. The waters adjacent to Amchitka hold rich fisheries. Pacific salmon that migrate through the area are important commercially. Japanese, Soviet and American fishermen take salmon, ocean perch and limited amounts of king crab.

The tritium released through groundwater motion will be diluted by the ocean currents. Even if the dilution is as great as a hundred thousand, there is the possibility of concentration of tritium well above background levels in various steps of the food chain. The detailed behavior of tritium in the food chain is uncertain though it is not generally thought to be concentrated. However, the possibility remains of fish being caught having higher than the backgrounds of radioactivity.

[Deletion]

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